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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

WALTER A. LAVENDER, Administrator de bonis non of the Estate of L. E. HANEY, Deceased,
Petitioner,
vs.
J. M. KURN et al., Trustees of ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, Debtor, and ILLINOIS CENTRAL RAILROAD COMPANY,
Respondents.

No. 550.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

REPLY BRIEF OF PETITIONER.

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REPLY BRIEF OF PETITIONER.

SUMMARY OF ARGUMENT.

1.

Haney, the deceased, was an employee of both respondents at the time he was killed. His duties under the control and direction of respondents, of opening and closing the switch for the interstate train of the trustees, directly affected and was in furtherance of interstate commerce.

Chapter 2, Title 45, U. S. Code, Section 51;
Linstead v. Chesapeake & Ohio Ry. Co., 276 U. S. 28, l. c. 34, 48 S. C. 241;
Denton v. Yazoo & M. V. R. Co., 284 U. S. 305, l. c. 308.

2.

The evidence most favorable to petitioner made a submissible case against both respondents.

Bailey v. Central Vermont Ry., 319 U. S. 350, 87 L. Ed. 1444, 63 Sup. Ct. 1062;
St. Louis, Iron Mountain & Southern Ry. Co. v. McWhirter (1913), 229 U. S. 265, 57 L. Ed. 1179, 33 Sup. Ct. 858;
12 A. L. R. 699;
Southern Railway Co. v. Gray (1916), 241 U. S. 333, 60 L. Ed. 1030, 36 Sup. Ct. 558.
Goslin v. Kurn, 351 Mo. 395, 173 S. W. (2d) 79;
(See cases cited in Point III in Petitioner's Brief.)

3.

The testimony of Respondent Trustees' employee Drashman that he heard one of respondent I. C.'s switchmen, while standing near Haney's body immediately after it was discovered, state that something sticking out from the Frisco train struck Haney, was admissible as part of the res gestae.

Chesapeake & Ohio R. Co. v. Mears (C. C. A. 4 1933), 64 F. (2nd) 291;
Armbast v. Cincinnati Traction Co. (C. C. A. 6 1928), 25 Fed. (2nd) 240;
Standard Oil Co. v. Johnson (C. C. A. 1 1924), 299 Fed. 93;
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Attleboro Mfg. Co. v. Frankfort Marine etc., 240 Fed. 573.

(a)

The admission of the statement made by the I. C. switchman at the time Haney's body was found was a matter of discretion of the trial court.

32 Corpus Juris Secundum 22;

Fort Street Union Depot v. Hillen (C. C. A. 6 1941), 119 F. (2nd) 307;
Barry v. Baker (C. C. A. 1 1936), 82 Fed. (2nd) 79.

4.

The admissibility of evidence in a suit under the Federal Employers' Liability Act is governed by Federal rather than local rules of law.

35 American Jurisprudence 874 (Sup.);
Bailey v. Central Vermont R. Co., 319 U. S. 350;
Tennant v. Peoria & P. V. Ry. Co., 321 U. S. 29.

ARGUMENT.

1.

At the time of his death, Haney was performing duties pursuant to the provisions of a contract entered into between the two respondents (R. pp. 155-167) as supplemented by letter agreement (Trustee's Exhibit "F." R. p. 108). Respondent trustee paid to respondent I. C. Railroad 2/12 of Haney's wages to reimburse them for that amount and also paid respondent I. C. Railroad for 2/12 of the cost of the electric lights at the switches which Haney was taking care of at the time he was killed. Plaintiff's evidence showed that Haney was paid by respondent I. C. Railroad (Plaintiff's Exhibit 6, R. p. 90) and he and his wife and family traveled on the I. C. Railroad on one of its employee passes (R. p. 88). Respondent I. C. Railroad Company owned the Grand Central Station and passenger terminal and had a written contract with respondent trustees for the joint use of the passenger terminal and station whereby the trustees paid the Illinois Central Railroad $1.87½ per passenger car switched into Grand Central Station, which included all the cars in the train that Haney was switching at the time he was killed. Haney was not performing any services for any other company or railroad other than the respondent's at the time he was injured and killed.

Witness Arnold testified that he was an employee of the respondent I. C. Railroad Co., and worked as a switchtender on the next crossing north of where Haney worked; that he opened the switch for the trustees' interstate passenger train the night Haney was killed and that his duties were the same as Haney's; that he had worked for the respondent I. C. Railroad as a switchtender for four years (R. p. 179), performing similar duties to those of Haney.

Under Chapter 2, Title 45, U. S. Code, Section 51, and

the cases of Linstead v. Chesapeake and Ohio Railroad Co., 276 U. S. 28, and Denton v. Yazoo & M. V. R. Co., 284 U. S. 305, l. c. 308, Haney was an employee of both respondents at the time he was injured and killed.

2.

The evidence most favorable to petitioner showed that on December 21, 1939, at about 7:30 P. M. within the railroad yards owned and operated by respondent I. C. Railroad in Memphis, Tennessee, Haney, the deceased, a switch tender in the performance of his duties, opened a switch so as to permit respondent trustee's interstate passenger train to back north into respondent I. C.'s Grand Central Station from an east and west track.

It was Haney's duty as switch tender, as well as a custom in the yards, to stand near the open switch until the backing train cleared the switch, then close it and return to his shanty (R. pp. 181-182, 265-266).

Red signal lights over the switch and over Haney's shanty prevented other train crews from using the switch and adjacent tracks. Immediately after the train cleared the switch, other switching crews waiting to use a crossing which Haney had blocked noticed that the light at the switch which Haney had opened remained red and prevented them from using the crossing. An investigation was made and Haney's body was found, lying face down, about 5 or 5½ feet north of the north rail, near the switch on a mound of dirt or cinders adjacent to the track on which the train had just backed over. Haney's body was lying face down with the head pointing southeast, or parallel to the track (R. pp. 175-76, 225-26), with a wound in the back of his head, extending upward across the back thereof. While the body was lying in this position and before it had been turned over, a man dressed in switchman's clothing identified as an I. C. switchman stated to

one of the trustees' employees that something sticking out from that train hit Haney (R. pp. 227, 205, 217), that's what happened. The only injury to Haney was the wound in the back of the head and bruises on his face caused by striking the ground. Haney's white cap had a dark mark on the outside in the back about an inch wide and 1½ inches long which ran at an angle up across the outside thereof which corresponded to the wound on Haney's head (R. pp. 167-168).

Trustees' interstate passenger train had backed east and turned north at the switch opened by Haney. The passenger train consisted of 12 cars with a Frisco mail car coupled next to the tender of the engine. This mail car had a mail hook on both sides fastened in a pivot at the top swinging down loose on the outside of the car with a round knob or ring on the end, the bottom of which was 73 inches from the top of the rail. There were mounds and piles of dirt and cinders north of the tracks at the switch where Haney's body was found, which were from 18 inches to 2 feet above the top of the rail (R. pp. 79, 80, 229, 261-266). Haney was five feet seven and one half inches or sixty-seven and one-half inches tall. The mail hooks hanging loose on the side of the car would swing out a distance of from 12 inches to 3 feet to the side of the car while the train moved around a curve or at excessive speed or over a wavy track (R. pp. 83-84, 62, 231). The passenger train as it backed past Haney went around a bad curve (R. p. 128). The side of the passenger train extended about 2½ feet out to the side of the track (R. p. 169).

There were no rods, pipes, weapons of any kind which could have caused the wound to the back of Haney's head, found near the body. Haney's pistol which was in his front pocket was found under his body (R. p. 175). The doctor who examined Haney's body and assisted in performing an autopsy testified that Haney's death was

caused by a fracture of the skull from a wound in the back of the head caused by a small round fast moving object striking the deceased in the back of the head which wound in his opinion could have been caused by a rod attached to the side of a train backing 8 or 10 miles an hour (R. pp. 247-248). The engineer testified that he backed the train in at about 8 or 10 miles an hour (R. p. 128).

The evidence further showed that at the switch and place where Haney worked, the ground was high and uneven and there was no artificial light and it was so dark that Haney could not see or be seen for any distance. One witness testified that he could not see how a man was dressed at the switch, ten feet away (R. p. 124.) Alvin Haney testified that it was so dark that he could not see a three-inch pipe 25 feet away (R. p. 277). The engineer testified that it was so dark that he could not see a rod three inches in diameter 50 feet away (R. p. 130) and that he did not see Haney's body lying at the switch as he passed and that it was possible that someone could have been lying there and he would not have seen them (R. p. 128), likely would not have. A light was erected over the switch afterwards (R. p. 23, 169). For a more complete statement of the facts see statement of the case, brief of petitioner, pages 4-11.

The case was submitted to the jury as against the trustees for negligently causing and permitting a rod or some other object to swing or extend out from the side of their train and strike Haney. The case was submitted to the jury as to the respondent I. C. Railroad for negligently failing to furnish Haney with a safe place to work. This instruction required the jury to find that the ground was high and uneven; that the light was insufficient and inadequate and that the place was unsafe and dangerous and that this constituted negligence and that Haney was injured and killed by reason of the place being unsafe and

dangerous. The jury so found. This instruction did not require the jury to find that Haney was killed by something sticking out from the side of the passing train. The respondents instructed the jury that if Haney went to the south side of the track and was last seen there before the train backed in they should find for the respondents.

In the case of Bailey v. Central Vermont Ry. (1943), 319 U. S. 350, 87 L. Ed. 1444, 63 Sup. Ct. 1062, this court reversed a state Supreme Court decision which had reversed a trial court and had held that there was not sufficient evidence of negligence to submit the cause to the jury. This court, after detailing the evidence most favorable to the petitioner, stated:

> "The nature of the task which Bailey undertook, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of a guard rail, the height of the bridge above the ground, the fact that the car could have been opened or unloaded near the bridge on level ground—all these were facts and circumstances **for the jury to weigh and appraise** in determining whether respondent in furnishing Bailey with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair-minded men might reach a different conclusion, emphasize the appropriateness of leaving the question to the jury. * * * The jury is the tribunal under our legal system to decide that type of issue, * * * as well as issues involving controverted evidence (citing cases). To withdraw such a question from the jury is to usurp its functions.
>
> "The right of trial by jury is a basic and fundamental feature of our system of Federal jurisprudence (citing case). It is part and parcel of the remedy afforded railroad workers under the Emp. Liability Act. * * *"

In the case of St. Louis, Iron Mountain & Southern Ry. Co. v. McWhirter (1913), 229 U. S. 265, 57 S. Ed. 1179, 33 Sup. Ct. 858, this court reversed and remanded a case to a State Court because of an erroneous instruction which authorized recovery upon showing of the employer's violation of the sixteen-hour law without requiring a showing of causal connection between the violation and the injury. This court after detailing the evidence made the following observation in respect to its right to review the decision of the state court:

> "While it is true, as we have said, that coming from a state court the power to review is controlled by Rev. Stat. 709, yet where in a controversy of a purely Federal Character the claim is made and denied that there was no evidence tending to show liability under the Federal law, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal Law."

In 12 A. L. R. 699 it is said:

> "As this is a Federal statute, the plaintiff, if he relies upon the common law, must prove his case in accordance with the principles of that law, as interpreted and applied in the Federal Court."

In Southern Railway Co. v. Gray (1916), 241 U. S. 333, 60 L. Ed. 1030, 36 Supreme Ct. 558, in a suit for the death of a brakeman who was killed on a railroad track after he fell asleep thereon, the court reversed a judgment against the railroad, on the ground that there was no evidence of its negligence, the court holding that a motion to dismiss should have been granted. The court in part said:

> "As the action is under the Fed. E. L. Act, rights and obligations depend upon it and applicable principles of common law as interpreted and applied in the Federal courts."

Respondent I. C. Railroad is charged with negligently failing to furnish the deceased with a safe place to work. Only four or five pages of respondent's 52-page brief are devoted to a discussion of that issue. Respondent discusses everything except the charge against it. In a rambling discussion of issues against the other respondent, it also claims that there was no duty upon it to furnish the deceased with a safe place to work because the accident happened in a public street of the City of Memphis. All the evidence shows that the place of the injury was entirely within the domination and control of the respondent I. C. R. R. within its terminal yards and on the tracks leading from its own grand central station to the Frisco line. Respondent's evidence only indicates that the switch which Haney had opened and the railroad tracks at that place were elevated above a street, which was a dead-end to all crossing public streets.

The case of Goslin v. Kurn (351 Mo. 395), 173 S. W. 3[illegible]79, holds that where a switchman is injured by catching his foot in a rut near the rails **across a public street**, the carrier is liable for failure to furnish a reasonably safe place for the switchman to work.

3.

Witness Drashman, an employee of the respondent trustees, testified that he went to the scene of the accident while Haney's body was still lying face down and before it had been turned over or removed (Abs. pp. 204-5). Haney's body was turned over within five minutes after it was found by Bruso and Bundy (R. pp. 27-28). Drashman testified that an I. C. switchman there where Haney's body was lying face down stated that something sticking out from the passenger train struck Haney. When questioned about this, witness Drashman, who was employed by respondent trustees and was shown to be hostile, made

several different statements about the matter. He testified:

> "I heard someone say that is what happened.
> Q: Did you so testify? A. Yes.
> Q. And that is true, isn't it? A. Yes.
> By the Court: Now do you want to explain your answer?
> By the Witness: Yes, sir."

Respondent's attorneys objected to their employee explaining and he did not make an explanation (R. p. 205). Witness Drashman testified, in answer to questions of respondent's counsel, that he did not know whether the I. C. switchman who made the statement was present or not when the accident happened (R. p. 216).

> "Q. And you don't know whether the person or persons that made such statement or statements were present when the accident happened or not do you? A. No, sir, I do not.
> Q. And you don't know whether they claim to have been present or not, do you? A. No, sir."

On redirect examination about this matter witness Drashman testified (R. p. 217):

> "Q. You stated a moment ago that the man who made the statement that something sticking out from the train hit Haney was an I. C. switchman down there at the switch that Haney had thrown, you remember that? A. Yes, sir.
> Q. That is true, isn't it? A. I think so, no one else was around there but I. C. men at that time."

Respondents claim that the I. C. switchman whose statement was heard by Drashman did not see the accident. Nevertheless, the undisputed facts show that the switchman made his statement immediately after the accident while standing over Haney's dying body.

The respondents offered instruction asking that the court withdraw from the jury's consideration statement made to witness Drashman to the effect that something sticking out from the train hit Haney. This instruction was refused (R. p. 147).

In the case of Chesapeake & Ohio R. Co. v. Mears (C. C. A. 4 1933), 64 F. (2nd) 291, in an action under the Federal Emp. L. Act for the death of an employee who was knocked off a car by another car on a siding, the court reversed a judgment for plaintiff because of a faulty instruction respecting the measure of damages, but held, among other things, that a statement which deceased made before his death was admissible as part of the res gestae. His statement was: "That car knocked me off." The court reviewed and approved several cases concerning the res gestae rule.

In Armbast v. Cincinnati Traction Co. (C. C. A. 6 1928), 25 Fed. (2nd) 240, the court held that a statement of an unknown bystander to a street car accident to the effect that "Lady you are hurt, you were thrown off that car," should have been admitted as part of the res gestae. The court cited in support of its ruling federal cases from the first, sixth and ninth circuits.

In Standard Oil Co. v. Johnson (C. C. A. 1 1924), 299 Fed. 93, the court approved the admission in evidence of the statement of an unknown bystander to an accident in which a pedestrian was killed by an automobile. The bystander said:

"Why didn't you blow your horn?"

The court, in part, said:

"Defendant's learned counsel has cited some cases which tend to sustain his contention. Nevertheless we think that, in the light of the decisions which should

guide **and perhaps must bind us**, the evidence was advisable."

The court then proceeded to cite and quote from Federal cases, and then cited cases from state courts. It relied upon the cases of Pierce v. Van Dusen, 78 Fed. 693, decided by the sixth circuit, and Attleboro Mfg. Co. v. Frankfort Marine etc., 240 Fed. 573, decided by the first circuit.

(3a)

It must be remembered that the trial court observed the demeanor of Drashman, saw that he was hostile to petitioner, learned that he was [redacted] brought to the trial from Memphis by respondent (R. p. 186) learned that he then worked and had worked for Frisco R. R. for forty years, heard him repudiate many sworn statements previously made in a deposition and observed how he acquiesced in answering leading questions of respondent's counsel. The trial court further learned that Drashman examined respondent trustees' train for protruding objects after he heard the statements made by the I. C. switchman. This discretion of the trial court in admitting the res gestae evidence should not be disturbed. The Federal authorities so hold.

In 32 C. J. S. 22 it is stated:

> "The facts and circumstances presented in different cases vary so widely that the courts have come to the point of adjudging this question as it is presented by the particular case under consideration, and the admissibility vel non of evidence as part of the res gestae is a matter resting very largely in the discretion of the trial court. The tendency of the courts, however, has been to extend rather than narrow the matters which may be admitted under the res gestae doctrine."

In the case of Fort Street Union Depot v. Hillen (C. C. A. 6 1941), 119 F. (2nd) 307, the court sustained a judgment for damages arising from death of brakeman struck by a grab iron on another car. Before he died the employee stated that he "got knocked off" the car he was riding by the grab iron on another car. The court in part said:

> "The time elapsing after the injury and all the circumstances bearing on spontaniety and lack of deliberation are factors to be considered. Here the actual time in minutes after the accident was not specifically shown but the circumstances and the movements of the witnesses clearly indicate, we think, that the statement was made about five minutes after the injury. * * * **Much must be left to the sound discretion of the trial judge in rulings on admissibility of evidence of the instant character.**"

In the case of Barry v. Baker (C. C. A. 1 1936), 82 Fed. (2nd) 79, involving an automobile collision, the court sustained a judgment for plaintiff against the attack, among others, that statements made by defendant's driver were inadmissible. The driver said: "When I seen you coming I thought you were coming on the other side of the road." In sustaining the trial judge who admitted the statement, the court said:

> "As to whether such declarations should be admitted in a given case, **the general and better rule seems to be that it is largely a question to be determined by the trial court upon consideration of all the circumstances disclosed.**"

4.

In the Bailey and Tennant cases and many others this Court has held that it will finally determine whether the evidence in a case of this kind will support a verdict. This Court cannot carry out such responsibility if a state court

may rule out of a case any or all competent evidence offered. Such attempts of exclusion of evidence would certainly effect the substantive rights of litigants and fritter away the beneficial purposes of the Congressional Act.

In 35 Am. Jur. 874 it is stated:

> "An action seeking recovery by virtue of the provisions of the Emp. L. Act must be brought in the manner that has been prescribed by the Act. Where the statute appears to govern any question as to substantive law, practice or procedure, the state law is superceded, and the Federal Act alone controls."
>
> Cumulative Supplement: "add following note 18. The rights created by the Federal Emp. L. Act are Federal rights protected by Federal rather than local rules of law." Citing case of Bailey v. Central Vermont R. Co., supra.

We, therefore, respectfully submit that this Honorable Court should reverse the judgment and decision of the Supreme Court of Missouri, and order the judgment in favor of petitioner reinstated.

Respectfully submitted,

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